Supreme Court, U.S.
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No. 91-348

In The

Supreme Court of the United States

October Term, 1991

WILLIAM AND PATRICIA CRISMAN,

Petitioners,

v.

ODECO, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO OPPOSITION TO CERTIORARI

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54 C.J.S. *Limitation of Actions*, Sectin 169 4

ARGUMENT

Medical Forms As A Red Herring:

If the medical-forms are a red herring, they are red enough to be a good stop light, no matter how smelly. Both sight and scent give ample warning. They show the attitude of the Circuit Court as a three-member jury. And if they are irrelevant because of other findings, they are certainly relevant for that point:

These assignment-forms are the forms that every patient fills out to let the doctor and the hospital directly bill the insurance carrier. Suppose a cancer patient has the sick organ removed and then undergoes chemical therapy. Each time she goes to the doctor for chemical therapy, the receptionist presents two forms, one consenting to the nuclear chemicals, the other for assignment of benefits. Every time, she will sign the blank forms; she has no idea what is placed on them as a diagnosis, any change of diagnosis, or any etiology. It is just, "Sign here, so we can bill your insurance carrier directly."

In Crisman's case, some of them were filled out on a typewriter; yet the Circuit Court says that the District Court "reasonably charged" him with knowledge of their content.

To us, relevant or irrelevant on any substantive or procedural point, this is the most relevant thing about the entire case: that Crisman must not now merely come forward with evidence; he must come forward with evidence that makes the Circuit Court say, "Yes, we are satisfied; we sit here as a jury at the gate, in front of the

jury in the box, and find as a matter of fact that he has tolled limitation."

Continuous Tort: Why The Need For Notice And Demand For Change Of Job?

The *Emmons* case does not say that at all.

Respondent insists that we have missed the mark in our analysis of *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir., 1983). If we have, then we should not be sanctioned; we should be disbarred. Our senility has become so severe that it has overwhelmed our mental and legal competence.

We hate to take time here for the substance of this case when our point is procedural. But Respondent insists that the proper analysis is very important. Here is the same one we set forth below, more extended than in our petition:

Emmons had weak or bad ankles either from birth or from a bout of polio. He had bad ankles at the time that he applied to the railroad for a job. He either hid or failed to reveal the fact, either intentionally or unintentionally. The road set him to doing average work that would not harm average ankles. But his were not average, and his were harmed by the work. If his ankles had been average, there would have been no harm. The road, in effect, replied, *Well, gee, we wouldn't have done this to this man. If he had only let us know about his weak ankles, we would not have put him to doing work that would hurt them. We thought he had average ankles; so, we put him to doing average work that any average ankles could stand. If you hold us liable on*

these facts then you are changing the FELA into a compensation act, pure and simple, not a damage suit based on negligence.

Emmons made no claim, as Folkes did, that, "The work given me would ruin the ankles of a normal man; *it was too heavy for normal ankles,* and it certainly ruined mine because they were weak to begin with." Emmons' plea and proof as to his second cause of action was that the railroad negligently assigned him to normal work, normal stress, when he was abnormal. The road said, "We didn't know it; he didn't say anything about it." The Circuit Court, in concluding that Emmons' evidence was not sufficient to send his second cause of action to the jury plainly held, at 701 F.2d 1120:

> "The issue of Southern Pacific's negligence was submitted to the jury on two grounds: [The first ground was held to have been barred by limitation as a single, isolated tort]; second, that it was negligent in allowing Emmons' assignment as a brakeman to continue when it knew or should have known that Emmons' preexisting polio condition would worsen. * * * As to the second ground [for cause of action, not for tolling of limitation], there is no evidence that Southern Pacific knew or should have known that Emmons' work as a brakeman caused or would have caused his preexisting condition to worsen."

So, the second cause of action fails not because of time limitation but because Emmons kept his bad ankles to himself: did not give the road notice, nor complaint, nor request for transfer. Since Emmons had no cause of action

on "the second ground," there was no reason to discuss its limitation; the cause did not exist.

But in *Fowkes,* the railroad hand was a jackhammer; bad jackhammers made his good shoulders bad because of continuing use. There was nothing to indicate that he would have to give notice or demand transfer.

The doctrine of continuous tort to toll limitation cuts across the entire spectrum of tortious conduct. It applies in cases where the relation of master and servant or principal and agent is not even involved; it applies in cases of adjoining neighbors; of hazardous chemicals escaping; of pollution of fluids of any type, air or water; in case of seepage of oil or chemicals: notice and demand are not required. 54 C.J.S. *Limitation of Actions,* Section 174, p.141; see also, Section 169, *et seq.*, p.127 *et seq.*

So, the *Emmons* holding is not that there was no continuing tort, *but no tort at all,* so far as the second cause of action was concerned, because it would turn the FELA into a compensation act to say that a cause existed. But if Emmons had had *normal* ankles, and the road had negligently overloaded them, the doctrine of continuing tort to bar limitation would apply.

One thing we know for sure: The respondent here is not saying that Emmons should have recovered on his second alleged cause of action if it had not been barred by time. It would be saying the same thing as the road, *He did not prove a second cause of action; so, there is nothing to talk about barring by limitation.*

Odeco can use dramatic language, such as "overwhelming" and "actual knowledge," "no genuine issue."

But the FELA and Jones Act are clear: A jury question exists unless there is a complete absence of evidence on the point. There is sufficient evidence, to say the least, to send Crisman's claim, that limitation was tolled by the continuing tort, to the jury.

Again, *Emmons* counted on two theories: His first alleged cause was that he should have been given a pre-employment physical; the Circuit Court held that the failure to give him the pre-employment physical was single tort, not a continuing tort, and was outside the period of limitation, and that there was nothing to invoke tolling under the discovery rule. The Circuit Court then examined the second alleged cause of action, that the road had knowingly worked a man with bad ankles when it knew or should have known that he had bad ankles, and simply found that there was no evidence to support the cause of action; and, therefore, there was no need to talk about limitation (page 1121):

> While it is undisputed that Southern Pacific's assignment of Emmons as a brakeman continued until his termination, there is no evidence that Southern Pacific was aware of Emmons's ankle problem until just before he was fired. Although there is some evidence that Emmons inquired about the possibility of a transfer with a Southern Pacific official, Emmons did not seriously pursue it or make an application, nor, more importantly, did he tell the official that the reason for seeking a transfer was that his duties as a brakeman were aggravating his ankle problem. We hold therefore that there is insufficient

evidence of negligence on the part of Southern Pacific in this regard.

But *Emmons* was after full trial.

CONCLUSION

Crisman is entitled to go to the jury under the theory of tolling because of continuing tort. The Circuit Court has simply cast the Seventh Amendment aside. Review should be granted.

Respectfully submitted,

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